ACLJ
American Center
for Law & Justice
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VIA OVERNIGHT DELIVERY SERVICE

Lieutenant General Charles N. Pede
The Judge Advocate General
Office of the Judge Advocate General
2200 Army Pentagon
Washington, D.C. 20310

RE: Religious Holiday Displays on Military Installations

Dear General Pede:

By way of introduction, the American Center for Law and Justice (ACLJ) is a non-profit organization dedicated to defending constitutional liberties secured by law. ACLJ attorneys have successfully argued numerous free speech and religious freedom cases before the Supreme Court of the United States. *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept other monuments merely because it has a Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8–1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

INTRODUCTION

About this time each year, groups like the Military Religious Freedom Foundation (MRFF), the Freedom From Religion Foundation (FFRF), and Americans United for Separation of Church and State (Americans United) begin to lodge complaints alleging violations of the Establishment Clause to the First Amendment because of religious displays erected, and religious expressions made, on public property, including military installations.

Just this past week, the MRFF claimed a "victory" because a Nativity scene was moved from the lobby of an unnamed "command's HQ building" to the installation chapel grounds,

[redacted]

following the MRFF's demands for this change.[1] Though the MRFF is withholding information about where this occurred, the MRFF's tactics are nothing new. The MRFF frequently seeks to intimidate those in leadership positions with faulty and erroneous legal reasoning until the MRFF reaches its desired end, which often results in decisions that are contrary to the First Amendment to the U.S. Constitution. The MRFF has attacked holiday displays containing religious elements,[2] access of chaplains to base websites available to other Service Members,[3] placing a Bible on POW/MIA memorials,[4] questions asking about attitudes about religion,[5] and others.

It appears that the MRFF and similar organizations seek to limit free exercise of religion in the U.S. Armed Forces to the point where it is tolerable to them. In effect, such groups are

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[1]Press Release, Military Religious Freedom Foundation, MRFF Victory! Military Base Nativity Scene Moved to Chapel Where It Should Be (Dec. 11, 2019), https://militaryreligiousfreedom.org/press-releases/2019/12-11-19-MRFF-Victory-Military-Base-Nativity-Scene-Moved-to-Chapel-Where-it-Should-Be.pdf.

[2]*E.g.*, the MRFF, through its counsel, the Jones Day Law Firm of San Francisco, sent a letter to the Base Commander at Travis AFB, demanding that religious holiday displays (to wit, a crèche scene celebrating Christmas and a menorah celebrating Hanukkah, two displays among a total of 15 displays, 13 of which were wholly secular) be removed from their prominent locations along the main road onto the base. The letter suggested that such displays would be better displayed "on the curtilage of the chapel" since "Travis AFB has, on its grounds, a chapel for religious members of the Air Force to celebrate their respective beliefs," in effect, limiting religious expression solely to the chapel and its immediate environs. *See MRFF, Allies Demand Removal of Unconstitutional Religious Displays at Travis Air Force Base*, MIL. RELIGIOUS FREEDOM FOUND. (Dec. 12, 2011), *available at* https://www.militaryreligiousfreedom.org/2011/12/121211-mrff-and-allies-demand-removal-of-unconstitutional-religious-displays-at-travis-air-force-base/.

[3]*E.g.*, the MRFF sent a letter to the Base Commander of Joint Base Elmendorf-Richardson (JBER), Alaska, complaining about an article written by the installation chaplain, entitled "No Atheists in Foxholes: Chaplains Gave All in World War II," and demanding that the article be removed from the website; that the chaplain be punished for the contents of the article; and that anyone else who "produc[ed], approv[ed] and disseminat[ed]" the article be punished as well. The chaplain's article was posted on "Chaplain's Corner," a portion of the base website specifically set aside for use by chaplains. As we explained in our letter to the Base Commander in response, the MRFF's position and demands were legally baseless. The chaplain's article was private speech that reflected his religious background – something that is totally permissible. The MRFF's allegation that such speech should have been censored was an intolerable misstatement of the law. *See Blake Page Demand Letter re: Joint Base Elmendorf-Richardson (JBER)*, MIL. RELIGIOUS FREEDOM FOUND. (July 24, 2013), *available at* http://www.militaryreligiousfreedom.org/2013/07/blake-page-demand-letter-re-joint-base-elmendorf-richardson-jber/.

[4]*E.g.*, Attorney Donald G. Rehkopf and the MRFF sent a formal complaint to Rear Admiral Paul D. Pearigen, MC, USN, because a Bible and a bi-lingual placard were part of the POW/MIA Display at the Marine Corps Base Camp Butler in Okinawa, Japan. In response to the MRFF's complaint, we sent a letter to Admiral Pearigen explaining why the passive presence of a Bible as part of a larger display with numerous non-religious items is clearly constitutionally permissible. *See letter from Donald G. Rehkopf, Jr., Attorney, Law Office of Donald G. Rehkopf, Jr., to Rear Admiral Paul D. Pearigen, United States Navy*, (Apr. 5, 2018) [Copy on file].

[5]*E.g.*, the MRFF sent a demand letter to the Superintendent of the United States Military Academy at West Point, alleging that the Superintendent and his staff were unlawfully "testing" the "religious preferences and practices (or lack thereof)" of the cadets who filled out the Class of 2013 Longitudinal Study of Character Survey. Despite Mr. Weinstein's allegations of wrongdoing, all cadets had been reminded in the letter of instruction concerning the survey that the 2013 survey was part of a series of surveys that the Class of 2013 had been given since arriving at the Academy, that the survey was designed to measure changes in cadet attitudes about leadership and character over time, and that the cadets' answers were (and would remain) confidential. *See letter from the MRFF to Lt. General (LTG) Huntoon* (Aug. 23, 2012), *available at* http://www.militaryreligiousfreedom.org/wp-content/uploads/2012/08/WestPointTest_08_24_12I.html.

suggesting that the Armed Forces adopt their flawed version of free exercise of religion. Yet, what is required of one's faith is independent of any governmental decree or policy or the desires of groups like the MRFF. Once Government officials begin to define what constitutes *acceptable* forms of religious belief and practice, they have already violated the Constitutional prohibition enshrined in the Establishment Clause.

Because the MRFF espouses a standard inconsistent with what the Constitution and U.S. law require, in the remainder of this letter, we provide you with information you can use to provide principled, legal arguments to support legitimate religious expression in the U.S. Armed Forces as well as to counter the arguments of those who advocate restrictions far beyond what the Constitution requires. We respectfully urge you to inform commanders to seek competent legal advice before responding to Mr. Weinstein's demands.

I. GENERAL PRINCIPLES CONCERNING RELIGIOUS FREEDOM.

The First Amendment to the U.S. Constitution reads, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. In 1892, the Supreme Court stated that "this is a religious nation." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470 (1892). More recently, Supreme Court Justice William Douglas, writing in *Zorach v. Clauson*, clearly and succinctly summarized the place religion holds in our history and the role the government plays in protecting religious expression and freedom:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that *lets each flourish according to the zeal of its adherents and the appeal of its dogma.*

343 U.S. 306, 313 (1952) (emphasis added).

Thus, "[i]n the relationship between man and religion, the State is firmly committed to a position of neutrality." *Sch. Dist. v. Schempp*, 374 U.S. 203, 226 (1963). The Court has consistently noted the importance the role of neutrality plays, emphasizing that neutrality prohibits hostile treatment of religion. In *Board of Education v. Mergens*, Justice O'Connor aptly noted that "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore *subject to unique disabilities*." 496 U.S. 226, 248 (1990) (emphasis added) (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978). Justice Brennan, in his concurrence in *Schempp*, also recognized that the Religion Clauses required the government to be neutral, not hostile, towards religion: "The State must be steadfastly neutral in all matters of faith, and neither favor *nor inhibit* religion." 374 U.S. at 299 (emphasis added).

Further, the Supreme Court has noted a clear distinction in the context of religious expression between government speech and private speech: "[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause *forbids*, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses *protect*." *Mergens*, 496 U.S. at 250 (emphasis added). The Court also aptly noted that it is not a difficult concept to understand that the Government "does not endorse or support . . . speech that it merely permits on a nondiscriminatory basis." *Id.*

When discussing the right to free exercise of religion, it must be clearly understood that free exercise of religion means what it says—free exercise. Free exercise may not be legitimately limited to what some Government official or civilian advocacy group, or attorney may think it should mean—or is willing to tolerate. After all, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981).

Hence, it is clear that the enforcement of a blanket rule prohibiting individuals serving in the military from discussing their faith or expressing other religious sentiments (whether in word or via a display) violates the most basic First Amendment rights of free speech and free exercise of religion. Every religion includes traditional practices. Different faiths require participation in different activities which are essential to the fulfillment of one's religious calling. An integral part of the Christian faith is sharing one's faith with others. Likewise, an integral part of the Islamic faith requires its adherents to fast during the month of Ramadan. Observant Jews are required to eat kosher foods. Clearly, adherents of different religious faiths practice their beliefs in numerous ways besides merely attending periodic religious services at formalized locations like chapels.

II. RELIGIOUS EXPRESSION IN THE MILITARY.

The Department of Defense has correctly recognized its responsibility under the Constitution to provide for the religious free exercise needs of men and women in uniform, consistent with the requirement to maintain good order and discipline.

A. Official DOD Policy Protects Religious Expression.

- All military commanders must provide for the free exercise of religion by servicemen under their command:
    - Commanders shall "provide for the free exercise of religion in the context of military service as guaranteed by the Constitution. . . ." U.S. DEP'T OF DEF., DIR. (DoDD) 1304.19, APPOINTMENT OF CHAPLAINS FOR THE MILITARY DEPARTMENTS para. 4.1 (11 June 2004).
- All requests to accommodate religious expression *should* be approved unless they adversely impact (1) military readiness, (2) unit cohesion, (3) standards, or (4) discipline:

- "The DoD places a high value on the rights of members of the Military Service to observe the tenets of their respective religions . . . . It protects the civil liberties of its personnel . . . to the greatest extent possible, consistent with its military requirements. . . ." U.S. DEP'T OF DEF., INSTR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES para 4(a) (10 Feb. 2009) [hereinafter DoDD 1300.17].

- "[U]nless it could have an adverse impact on military readiness, unit cohesion, and good order and discipline, the Military Department will accommodate individual expressions of sincerely held beliefs (conscience, moral principles, or religious beliefs) of Service members. . . ." DoDD 1300.17 para 4(b).

- When resolving *difficult* questions about religious accommodation, commanders should consider the following factors:

  - "The importance of military requirements in terms of mission accomplishment, including military readiness, unit cohesion, good order, discipline, health, and safety."
  - "The religious importance of the accommodation to the requester."
  - "The cumulative impact of repeated accommodations of a similar nature."
  - "Alternative means available to meet the requested accommodation."
  - "Previous treatment of the same or similar requests, including treatment of similar requests made for other than religious reasons." *See* DoDD 1300.17 enclosure, para. 1(a)–(e).

B. Limitations on Religious Free Exercise in the Armed Forces May Be Justified Solely by Actual Military Necessity, Not by a "Heckler's Veto" of Those Opposed to Religion.

A major concern regarding free exercise of religion in uniform deals with how commanders determine when unit cohesion is adversely affected since "adverse impact" on "unit cohesion" is a very vague standard. To protect religious expression to the extent required by the Constitution, commanders must not curtail accommodation based on hypersensitive or hostile reaction, merely because one or a few Service Members dislike the religious message. As noted in *Lee v. Weisman*, the Supreme Court did "not hold that *every state action* implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation." 505 U.S. 577, 597 (1992) (emphasis added). Where the offending expression is a private message made by one or more individuals (i.e., not "state action"), the commander must be even more careful in fulfilling his responsibility to protect and defend the Constitutional rights of the Service Members under his command, since First Amendment rights were intended to protect the individual from his own Government.

In other words, threats to unit cohesion must be real, not illusory. Accordingly, commanders must studiously avoid blindly reacting to complaints (such as the frequent, erroneous

Establishment Clause complaints lodged by the MRFF and similar groups), especially when any reasonable, minimally informed, person knows that no endorsement of religion is intended. That principle was clearly enunciated in *Americans United for Separation of Church & State v. City of Grand Rapids*, where the court noted that there are persons in our society who see religious endorsements, "even though a reasonable person, and any minimally informed person, knows that no endorsement is intended." 980 F.2d 1538, 1553 (6th Cir. 1992). The court characterized such a hypersensitive response as a form of heckler's veto which the court labeled an "Ignoramus's Veto." *Id.*

III. GOVERNMENT-SPONSORED RELIGIOUS DISPLAYS ARE CONSTITUTIONAL SO LONG AS THE RELIGIOUS ELEMENTS OF THE DISPLAY ARE PART OF A LARGER HOLIDAY EXPRESSION.

The Supreme Court of the United States has upheld the constitutionality of *government-sponsored holiday displays* that include religious components. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court upheld the constitutionality of a display that included a government erected crèche because it was a part of a larger holiday display in which there were a number of secular symbols. The Supreme Court further recognized that Christmas is a National Holiday observed "in this country by the people, by the Executive Branch, by the Congress, and the courts for [two] centuries." *Id.* at 686. As Justice O'Connor explained, "[c]elebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose." *Id.* at 691 (O'Connor, J., concurring).

The Court held that the inclusion of the crèche as part of a holiday display did not violate the three-prong Lemon Test. Specifically, under the "primary effect" prong, the Court held that "display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums." *Id.* at 683.

In examining these types of displays, courts generally hold that so long as the religious elements of the display are part of a larger holiday expression—with Christmas trees, Santa Claus, reindeer, candy canes, and the like—such that the primary effect of the entire display is secular, the display is constitutional. *See Salazar v. Buono*, 559 U.S. 700, 716–21 (2010) (plurality opinion) (noting importance of context and purpose of public displays and reiterating that "goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm"); *see also McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005) (conducting similar purpose and effect analysis of entire display in Ten Commandments cases).

IV. IN SOME INSTANCES, RELIGIOUS DISPLAYS MAY BE PROHIBITED ON PUBLIC PROPERTY.

In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Supreme Court clarified the law regarding holiday displays with religious content, holding that *the context of the display is key.*

In *Allegheny*, the Court examined two holiday displays on government property: 1) a crèche bearing a banner that proclaimed "Glory to God in the highest," standing alone on the Grand Staircase of the county courthouse; and 2) a menorah displayed as part of a larger winter holiday exhibit in front of the City-County building, which included a Christmas tree and a sign saluting liberty. *Id.* at 578.

The Court held that the crèche display violated the Establishment Clause, but that the menorah and Christmas tree display did not. *Id.* at 600, 620. In applying Justice O'Connor's endorsement test, the Court focused on content and context, examining the physical setting of the displays. "[T]he government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context." *Id.* at 597. The appropriate standard for judging the context of the display was what a reasonable observer would think. *Id.*

Applying this standard to the crèche, the Court determined that "it sends an unmistakable religious message." *Id.* at 598. "The crèche stands alone" such that "nothing in the context of the display detracts from the crèche's religious message." *Id.* at 598. The crèche's location on the Grand Staircase, the main and most beautiful part of the building, was also problematic since "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government." *Id.* at 599–600

By contrast, the Court held that the menorah was constitutional because the accompanying Christmas tree and the sign saluting liberty neutralized the religious dimension of the menorah display and emphasized its secular dimensions. *Id.* at 616-19. Justice Blackmun, the only Justice who dissented in *Lynch*, agreed that the inclusion of a menorah in a holiday display did not endorse Judaism and acknowledged that the Christmas holiday had attained a sort of "secular status" in our society. 492 U.S. at 616.

Thus, *Lynch* and *County of Allegheny* do not support the proposition that governments must exclude religious symbols from general holiday displays. *Exclusion of a religious symbol is only required by the Establishment Clause if the religious symbol is not part of a larger holiday display containing other holiday symbols.* Therefore, *Lynch* and *County of Allegheny* establish that context is the linchpin when evaluating the constitutionality of religious symbols on government property. In other words, religious symbols that might, standing alone, raise Establishment Clause concerns, are permissible when presented in the context of a broader, holiday display, which includes secular symbols like Christmas trees and Santa with his reindeer.

V. THE ESTABLISHMENT CLAUSE DOES NOT FORBID ALL PRIVATE RELIGIOUS DISPLAYS ON GOVERNMENT PROPERTY.

If any of the displays complained about by the MRFF and similar groups were privately erected (such as by a chapel congregation), the following principles apply. The government may permit private individuals or groups to display holiday themed items on public property. The Supreme Court of the United States has identified three types of public property for First Amendment

expressive purposes: the traditional public forum, the open or designated public forum, and the non-public forum. *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983). Certain government properties are presumed to be traditional public fora (streets, sidewalks, and parks). *See United States v. Grace*, 461 U.S. 171, 177 (1983). As the Supreme Court has stated, "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939). While the First Amendment does not require the government to allow privately-owned permanent or seasonal displays in public parks, *see Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009), the government must act in a viewpoint-neutral manner if it chooses to do so.

In addition to streets, sidewalks, and parks, other areas that "the state has opened for use by the public as a place for expressive activity" may be considered "open or designated" public fora. Whether the property in question is considered a traditional public forum (*e.g.*, street, sidewalk, park, or plaza) or a designated public forum (*e.g.*, a government building, community center or other state-owned facility), the ability of governing authorities "to limit expressive activities [is] sharply circumscribed." *Perry Educ. Ass'n*, 460 U.S. at 45. Government officials may not prohibit religious speakers from these places on the basis of viewpoint unless they demonstrate a compelling government interest for doing so. *Carey v. Brown*, 447 U.S. 455, 461, 464 (1980). As the Court held in *Lamb's Chapel*, "[t]he principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" 508 U.S. at 394 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). *Hence, if a military installation were to allow secular holiday displays but exclude displays with religious symbols, it would unconstitutionally disfavor religion to the benefit of non-religion.*

The Supreme Court has consistently ruled that the Establishment Clause does not require a state entity to exclude private religious speech from a public forum. It is, in fact,

> peculiar to say that government "promotes" or "favors" a religious display by giving it the same access to a public forum that all other displays enjoy. And as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763-64 (1995). In one of the most powerful proclamations upholding the rights of private religious speakers in a public forum, the Supreme Court stated:

> The contrary view . . . exiles private religious speech to a realm of less-protected expression heretofore inhabited only by sexually explicit displays and commercial speech. . . . It will be a sad day when this Court casts piety in with pornography, and finds the First Amendment more hospitable to private expletives . . . than to private prayers. This would be merely bizarre were

> religious speech simply as protected by the Constitution as other forms of private speech: but it is outright perverse when one considers that private religious expression receives *preferential* treatment under the Free Exercise Clause. It is no answer to say that the Establishment Clause tempers religious speech. By its terms that Clause applies only to the words and acts of *government*. It was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum.

Id. at 766-67 (internal citations omitted).

Moreover, in *Mergens*, the Supreme Court noted a key distinction in this regard: "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." 496 U.S. at 250. In fact, the Supreme Court has stated that a policy of excluding private religious speakers from public places where other speakers are permitted is unconstitutional:

> Indeed, the message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion. "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."

Id. at 248 (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978)).

VI. THE FIRST AMENDMENT PROTECTS THE RIGHT OF CITIZENS, CIVIC GROUPS, AND CHURCHES TO ERECT RELIGIOUS-THEMED HOLIDAY DISPLAYS IN PUBLIC AREAS WHERE PRIVATE NON-RELIGIOUS HOLIDAY DISPLAYS ARE PERMITTED.

The Constitution protects the right of private citizens to engage in religious speech in a public forum. In *Pinette*, the Supreme Court held that a private group could erect a cross in a public park during the holiday season. *Pinette*, 515 U.S. at 770. The Court noted:

> Respondents' religious display in Capitol Square was private expression. Our precedent establishes that private religious speech, far from being a First Amendment orphan, is fully protected under the Free Speech Clause as secular private expression. . . . Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Id. at 760 (internal citations omitted). Key factors in the Court's decision were: 1) the public park in question had historically been open to the public for a variety of expressive activities; 2) the group erecting the cross had requested permission through the same application process and on the same terms required of other private groups; and 3) the group planned to accompany the cross with a sign disclaiming any government sponsorship or endorsement. *Id.* at 763; *id.* at 782 (O'Connor, J., concurring); *id.* at 784 (Souter, J., concurring).

In addition, the *County of Allegheny* and *Lynch* cases establish that religious displays on government property that is not a public forum may nevertheless be constitutional if they are accompanied by other secular symbols relating to the holiday. For example, the holiday display upheld in *Lynch* contained a crèche, as well as a Santa Claus house, reindeer, candy canes, a Christmas tree, carolers, and toys. 465 U.S. at 671. The display upheld in *County of Allegheny* contained a menorah and a Christmas tree. 492 U.S. at 582.

Thus, *Pinette*, *Lynch*, and *County of Allegheny* teach that private citizens may erect religious displays on public property if: 1) the property is a public forum in which the government has permitted a wide variety of expressive conduct (at least where there is a sign informing the public that the display is sponsored by private citizens and the government is not endorsing its message); or 2) the display is accompanied by a variety of secular holiday symbols such that the overall message of the display is not exclusively or primarily religious.

CONCLUSION

The MRFF and its allies have seriously misconstrued the Constitutional requirements regarding religious exercise and expression in the U.S. Armed Forces. The MRFF seeks to convince the Armed Forces that virtually all religious expression (including unattended holiday displays) must be excised from the daily life of Service Members. The standard to apply is the "reasonable observer" standard.

Justice O'Connor aptly noted the following regarding the "reasonable observer" of such displays:

> There is always someone who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing . . . simply because a particular viewer of a display might feel uncomfortable. *It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious* [*activity*] *appears.*

Pinette, 515 U.S. at 779-80 (emphasis added). *See also Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828-29 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . Discrimination against speech because of its message is presumed to be unconstitutional. . . .").

Service Members are deemed to be "reasonable observers." As such, they are deemed to know that many different faith groups are represented in the military, that different faith groups recognize and celebrate different religious holidays, that it is common to see displays erected to celebrate such holidays, and that the military does not endorse one religious holiday over another merely because it permits such displays on a military installation.

The MRFF and its allies want to remove all semblance of religious expression from the public sphere and limit it to the chapel setting. Such a policy singles out religion and its adherents for special detriment, thereby violating the very Establishment Clause the MRFF and its allies claim to be protecting. The Armed Forces have an obligation to protect the free exercise rights of all Service Members—believers and non-believers alike. Limiting religious expression to avoid offending the non-religious requires military officials to determine which religious expression to allow and which to disallow, in effect, preferring certain types of religious expression over others, in itself something Government officials are precluded from doing by our Constitution. Allowing both religious and non-religious holiday displays on a military installation fully meets the requirements of neutrality and neither favors nor disfavors religion.

In light of the foregoing, DOD and each respective Service should utterly reject such specious complaints when they surface, irrespective of which group or organization raises the complaint.

Moreover, should you or your Service desire ACLJ assistance in dealing with such a matter or in drafting or reviewing guidelines for subordinate commanders faced with similar or future MRFF demands, we stand ready to assist you.

Respectfully yours,

Jay Alan Sekulow
Chief Counsel

Robert W. Ash
Senior Counsel

cc: General James C. McConville, Chief of Staff, USA